

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEW JERSEY

3 MINMETALS, INC., .  
4 Plaintiff, . Case No. 13-cv-03834  
5 vs. . Newark, New Jersey  
6 DRAGON BOOM, LTD., . February 11, 2014  
7 Defendant. .  
8 .

9 TRANSCRIPT OF HEARING  
10 BEFORE THE HONORABLE CATHY L. WALDOR  
11 UNITED STATES MAGISTRATE JUDGE

12 APPEARANCES:

13 For the Plaintiff: GREGORY KARL MUELLER, ESQ.  
14 Law Offices of Gregory K. Mueller, PC  
15 26 Franklin Street  
16 Tenafly, NJ 07670  
17 (201) 567-4969  
Email: Gmueller@muellerfirm.com

LEODIS C. MATTHEWS, ESQ.  
Dacheng Law Offices  
Email: Leodis.matthews@dachenglaw.com  
Tel: 001-323-930-5690

18 For the Defendants KEVIN GERARD WALSH, ESQ.  
19 B & H American Gibbons PC  
20 Inc., Gary One Gateway Center  
21 International Newark, NJ 07102  
22 Holdings Limited, (973) 596-4500  
Hangzhou Baohang Email: Kwalsh@gibbonslaw.com  
23 Industrial

Investment Limited, WILLIAM H. DEVANEY, ESQ.  
24 Min Dang and Xiyou Venable LLP  
25 Xu Rockefeller Center  
1270 Avenue of the Americas  
Twenty-Fourth Floor  
New York, NY 10020  
(212) 983-8204  
Email: Whdevaney@Venable.com

1 For the Defendant JOHN J. JANIEC, ESQ.  
2 Dragon Boom, Ltd.: 350 Fifth Avenue  
Suite 4510  
3 New York, NY 10118  
(212) 629-0027  
4 Email: Jjaniec@jjjlawoffice.com

5  
6 Audio Operator:

7  
8 Transcription Service: KING TRANSCRIPTION SERVICES  
9 901 Route 23 South, Center Ste. 3  
Pompton Plains, NJ 07444  
(973) 237-6080

10 Proceedings recorded by electronic sound recording; transcript  
11 produced by transcription service.  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 (Commencement of proceedings at 11:21 A.M.)

2

3 THE COURT: We're here on Minmetals versus Dragon  
4 Boom, Docket Number 13-3834.

5 May I have appearances, please?

6 MR. MUELLER: For the plaintiff Minmetals,  
7 Your Honor, Gregory Mueller of the law offices of Gregory K.  
8 Mueller, PC.

9 MR. MATTHEWS: And Leodis C. Matthews, Your Honor,  
10 of the Dacheng Law Offices.

11 MR. WALSH: Good morning, Your Honor, Kevin Walsh  
12 from Gibbons representing various defendants: B & H American  
13 Inc., Gary International Holdings Limited, Hangzhou Baohang  
14 Industrial Investment Limited, as well as Min Dang and Xiyou  
15 Xu.

16 And to my right, your left, Your Honor, is William  
17 Devaney from Venable, admitted pro hac vice and, with the  
18 Court's permission, will be arguing behalf of those  
19 defendants I just enumerated.

20 MR. DEVANEY: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. JANIEC: Good morning, Your Honor, my name is  
23 John Janiec, and I appear for the defendant Dragon Boom.

24 THE COURT: Thank you.

25 Defendants, this is your motion, and we're here on

1 the motion to stay discovery. And I take note that we've  
2 reviewed the various submissions, Docket Number 42, 46, and  
3 47, as well as pending motions before the district judge,  
4 Judge Hayden.

5 So I'll permit you to advance your arguments.

6 MR. DEVANEY: Very good. Thank you very much,  
7 Your Honor.

8 As Your Honor alluded to, there's been a lot of  
9 activity in this case, to say the least. There's been  
10 litigation in state court. When we became involved, we  
11 remanded to federal court here. There are six pending  
12 motions, including this one, before this Court. There's been  
13 litigation in China, both arbitrations before SETAC,  
14 litigation before the Beijing People's Intermediary Court,  
15 and also litigation in Hong Kong, with respect to asset  
16 freezes.

17 But the issue before Your Honor today is a very  
18 narrow one, and that is whether to stay discovery pending the  
19 outcome of a motion to compel arbitration, which is before  
20 the District Court. That motion was fully briefed in early  
21 September, pending before the District Court, and I would  
22 hope and anticipate a decision in the not-too-distant future.

23 And a motion to stay makes sense, because in that  
24 motion to compel arbitration, the court will either decide we  
25 ought to arbitrate this before SETAC in China, will obviate

1 the need for any discovery whatsoever, or the Court will  
2 narrowly tailor the discovery to the issue of arbitrability,  
3 in other words, the issue of Li Zheng's authority.

4 And let me take a step back into the background, if  
5 I may. If Your Honor would like, I can go through the  
6 tortured procedural history to this case, but I'd prefer to  
7 just kind of stick with the basics for purposes of this  
8 motion.

9 THE COURT: Okay.

10 MR. DEVANEY: But at any time the Court would like  
11 to hear more, I'm happy to do it.

12 Plaintiff Minmetals is the U.S. arm of a giant  
13 Chinese state-owned enterprise. It's one of the largest  
14 corporations in the world. It's a global Fortune 200  
15 corporation. The defendants' various trading companies,  
16 except for Hangzhou Baohang, which has an ownership interest  
17 in various of the defendants, and that too is a large Chinese  
18 corporation, the individual defendants are the owners and  
19 operators of some of those trading companies, but  
20 significantly -- and this is a name I had mentioned a moment  
21 ago, one of the individual defendants is Li Zheng. By -- in  
22 plaintiff's complaint, they describe Li Zheng as the head of  
23 their rare earth business at the relevant time and the  
24 authorized signatory to the contracts.

25 THE COURT: And a trusted executive employee.

1           MR. DEVANEY: Correct. He is still a trusted  
2 executive employee. And we understand he was actually  
3 promoted at China Minmetals in 2012.

4           At the heart of this dispute are seven commercial  
5 contracts and a purchase order that Mr. Zheng executed on  
6 behalf of Minmetals. They're all for either the purchase or  
7 the sale of rare earth. And rare earth is a mineral that is  
8 used in various industrial applications, making batteries,  
9 they go into, you know, various high tech. And most of the  
10 rare earth in the world comes from China. So China really  
11 controls the market.

12           In seven of those eight, the defendants were  
13 purchasing rare earth from the plaintiffs. In one of the  
14 transactions, the defendants actually sold rare earth to the  
15 defendants [*sic*].

16           The amount of rare earth that the defendants  
17 purchased from plaintiffs is \$8.5 million worth of rare  
18 earth. The one transaction of which I alluded to is and  
19 which one of the defendants, B & H, sold rare earth to the  
20 plaintiffs, was about a \$1.2 million transaction.

21           The defendants have performed each and every one of  
22 these contracts, meaning, in all instances, they paid one,  
23 and we paid \$8.5. We've delivered the rare earth in the one  
24 instance in which we were delivering it.

25           Plaintiffs -- and I don't mean to argue

1 Mr. Janiec's brief with respect to Dragon Boom, Dragon Boom  
2 paid approximately \$2.4 million in two of the transactions  
3 for rare earth. The defendants never delivered their -- I'm  
4 sorry, the plaintiffs never delivered the rare earth, never  
5 returned the money to Dragon Boom.

6 That is the subject of one of the SETAC  
7 arbitrations.

8 On the flip side, in the one instance where B & H  
9 sold rare earth to defendants -- I'm sorry to plaintiffs --  
10 the plaintiffs kept the rare earth, did not return it to us,  
11 and never paid the \$1.2 million.

12 Significantly, with respect -- these transactions,  
13 there's an arbitration clause and a very broad one, which  
14 says all disputes arising from or in connection with the  
15 contracts should be arbitrated in front of SETAC in China.  
16 Not should be arbitrated; actually must be arbitrated. The  
17 choice of law in those contracts is China. The place of the  
18 signing, because of Li's at all times was in China, was  
19 China. The origin of the goods, with one exception, was  
20 China. And the -- with one exception was China.

21 At the heart of this dispute is that plaintiffs  
22 argue, we, the defendants, bought rare earth at below market,  
23 and the one instance when we sold it and -- we sold it at  
24 above-market prices. And that we stole customers from them  
25 in the process of these various transactions.

1                   How this came about is they say because we're in  
2 cahoots with Li Zheng. And they offer no motive for Li Zheng  
3 to have done this in the dozens of briefs that have been  
4 filed and now probably approaching thousands of exhibits,  
5 short of they all went to college together in China.

6                   Now, turning to the motion to stay discovery,  
7 let -- the one issue before the Court at this time really  
8 comes from the Federal Arbitration Act, which in and of  
9 itself is a very strong policy in favor of arbitration. And  
10 as the Third Circuit has laid out in the Clapper [phonetic]  
11 case, the reason for that is you don't want parties who have  
12 contracted to arbitrate, to have the expense, delay and  
13 inconvenience of litigating under the federal rules if they  
14 have contracted not to do that. And, in fact, a court's  
15 jurisdiction where there's an issue of arbitrability is  
16 limited that issue. And if the court decides any discovery  
17 is necessary, that discovery also must be limited to the  
18 narrow issue of arbitrability.

19                  THE COURT: So Mr. Zheng's authority goes to, or  
20 does it not, arbitrability?

21                  MR. DEVANEY: It does, Your Honor. And I believe  
22 and we have argued that it is the sole issue. And it's not  
23 just his apparent authority, which we mentioned it, on the  
24 face of the complaint, head of the business, authorized  
25 signatory and trusted executive; it's also his apparent



1 authority. Did we know, given all of that, given that that's  
2 the face Minmetal puts to the outside world on Li Zheng,  
3 could we have known, should we have known that he did not  
4 have the authority to enter into these contracts?

5 Now, I'm skipping ahead a little bit, but under  
6 Guidotti analysis, a court is to determine on the face of the  
7 complaint in the first instance, whether or not the case  
8 should be sent to arbitration under a 12(b)(6), under a  
9 motion to dismiss standard. We believe that that's apparent  
10 from his apparent authority and also the actual authority --  
11 I'm sorry -- the actual authority is readily apparent  
12 authority. They have to come forward with reliable evidence,  
13 more than mere assertion, more than a naked conclusion that  
14 he was not authorized, both actual authority as well as  
15 apparent authority.

16 Our argument is they have not done that. They  
17 cannot do this, and the case should proceed immediately to  
18 China.

19 However, under the Guidotti standard, the Third  
20 Circuit has held that if a district court determines that  
21 they have come forward with reliable evidence, then they may  
22 proceed to discovery, but only on the sole issue of  
23 arbitrability; in this case, the sole issue of Li Zheng's  
24 authority. Then the district court can come back after that  
25 point -- is to come back after that point and determine it

1 under a Rule 56 standard.

2           Guidotti -- I think the elephant in the room here  
3 now is what about the Superior Court order? Has this been  
4 raised before? In the Superior Court before this case was  
5 removed, obviously, there was a motion to dismiss the  
6 complaint, and one of the arguments made was that there's an  
7 arbitration clause, and this should be sent immediately to  
8 China.

9           The plaintiffs argue that the entire contract was a  
10 fraud, that they were fraudulently induced into entering into  
11 a contract. And the Superior Court, as -- using the  
12 appropriate standard, taking all allegations in the best  
13 light for the plaintiff, looked at the actual allegations,  
14 because if they are arguing fraudulent inducement, that's a  
15 one-way ticket to arbitration, that's something that must be  
16 arbitrated.

17           So the Superior Court, looking at the totality of  
18 their allegations, said, no, you're really talking about Li  
19 Zheng's authority. You say she [sic] didn't have the  
20 authority. And that is something for the court to decide in  
21 the first instance. And that, then, is what the Superior  
22 Court did. The court decided the gist of the allegations are  
23 Li Zheng lacked the authority; that is something for the  
24 court and not the arbiters to decide.

25           Having denied the entire motion to dismiss, the

1 Superior Court then jumped over the entire Guidotti analysis  
2 and ordered discovery to proceed.

3           You can't blame the Superior Court for doing that,  
4 because Guidotti hadn't been decided. Guidotti was decided  
5 five months later. The Third Circuit specifically says in  
6 Guidotti that there were different precedents, different  
7 standards flying around the Circuit, and they were looking to  
8 standardize them. And they came up with exactly that process  
9 that I laid out for Your Honor, that -- so if you look at the  
10 Superior Court decision, the Superior Court, contrary to what  
11 plaintiffs have said in various pleadings, did not decide  
12 that we were not permitted to arbitrate, did not say that the  
13 arbitration clause was invalid, did not say that Li Zheng had  
14 authority.

15           The only thing the Superior Court said is we decide  
16 this. I decide this. That's the "who" decides it.

17           What the Superior Court didn't address is how it is  
18 to be decided. That's Guidotti. Guidotti lays out how  
19 these -- this process is to go.

20           Therefore, Your Honor, we would request, we think  
21 it's practical, there's a long line of federal case law  
22 before Guidotti that where a motion to compel is pending,  
23 discovery is stayed. We do not believe that's inconsistent  
24 with the Superior Court's order. Of course, the Superior  
25 Court did not have the benefit of Guidotti. This is the same

1 motion we would be making before the Superior Court if we  
2 were still there.

3           Additionally, I simply point out to Your Honor that  
4 once this case had been removed, this Court has the  
5 discretion, as well, to revisit any orders of the Superior  
6 Court. We don't believe that's necessary, because we don't  
7 believe that's inconsistent.

8           And finally, just as a practical matter, as we  
9 noted, this case had been fully briefed for about five-plus  
10 months now. A decision should be coming down imminently from  
11 the District Court, and it makes the most sense to just keep  
12 things in the status quo, until we've gotten guidance on  
13 either we're going to arbitrate, or there's going to be  
14 discovery on this narrow issue and not the broad-based  
15 discovery that plaintiffs have propounded.

16           THE COURT: And we have not even Rule 16'd this  
17 case.

18           MR. DEVANEY: We have not, Your Honor.

19           THE COURT: So there is no discovery order,  
20 scheduling order in place.

21           MR. DEVANEY: Not from the federal court,  
22 Your Honor, that's correct.

23           THE COURT: Okay. Thank you.

24           MR. DEVANEY: Thank you.

25           THE COURT: Who will be arguing?

1 MR. MATTHEWS: I will, Your Honor, thank you.

2 THE COURT: You can stay at the table or use the  
3 podium. It's up to you, wherever you're more comfortable.

4 MR. MATTHEWS: No, Your Honor, if the Court pleases  
5 I'm happy to step up to the table. And appreciate the time  
6 that the Court has taken.

7 Your Honor, the briefs that were filed in this case  
8 was an effort to acquaint the Court with some of the details  
9 of the case so that the Court would have a feel for the  
10 history of the case and the issues.

11 Obviously, we differ with the defendants'  
12 characterization of what the complaint is all about.

13 The complaint, we feel, and the dispute between the  
14 parties stem from an agreement that was made prior to any  
15 contracts at all that was executed, between Dang Min and Li  
16 Zheng in a meeting in an effort to undertake and conspire to  
17 use assets of Minmetals, and then after that time, in fact, a  
18 month later, they put into place a plan.

19 The evidence that we have -- and there is --  
20 counsel seems to indicate that there is no proof. Obviously,  
21 that's disputed. We've recently filed before the Court a  
22 motion for a preliminary injunction, and in there, we have  
23 detailed emails between Li Zheng and Dang Min with respect to  
24 confidential, normally trade secret information that  
25 Minmetals contained [sic]. The -- in discovery, we have

1 evidence that, in fact, they entered into an agreement.  
2 That's undisputed. So the email, the secretive communication  
3 between the two, basically set up the scheme that they were  
4 going to undertake.

5           The evidence that we have sought in this case, have  
6 been from Dang Min with respect to those emails. And I would  
7 just cut right to the chase, Your Honor. The state court  
8 judge, who was very familiar with all the details in this  
9 case, ordered that the defendants produce their emails. And  
10 that was done over a year ago. And at that time, that order  
11 was outstanding for over almost 7 months before this case  
12 actually -- before the case was moved from state court to the  
13 federal court.

14           I might also point out, Your Honor, that at the  
15 time, the defendants were also facing a motion from the state  
16 judge with respect to an order to show cause, why they should  
17 not -- why they should not be held in contempt with respect  
18 to the filing of an arbitration, B & H; exactly, the very  
19 instant that they're speaking about today.

20           Now, what happened before the state court on the  
21 merits, is that the state court looking at the case as a  
22 whole, determined that there would -- that the discovery  
23 would go forward unlimited. That was the determination. And  
24 if the Court were to review that January 2d order from Judge  
25 Velazquez, he essentially stated that in order for him to

1 hold a hearing on the issue of the arbitrability of Li  
2 Zheng's authority to have put in the arbitration clause, he  
3 would basically have to hear it, the whole case; he would  
4 have to hear the issue concerning his authority. And that  
5 was a relatively broad issue. The discovery that he ordered  
6 in this case goes exactly to the issue that counsel has  
7 argued about: Whether or not Dang Min knew at the time he  
8 entered into this agreement that it was not based upon any  
9 apparent authority, but it was a secret agreement between  
10 them in order to exploit a rare earth market that was  
11 exploding at the time.

12 I think it's important, Your Honor, to sort of have  
13 a sense of those substantive issues, because in this case,  
14 when Hangzhou Baohang joined the litigation or answered,  
15 finally, the case and eventually moved it to the federal  
16 court, the court had already ordered sufficient discovery and  
17 provided to defendants an opportunity to come back in after  
18 discovery at any time that they thought that there hadn't  
19 been sufficient discovery. The plaintiffs had submitted to  
20 the court in an order to compel, a motion to compel, which  
21 the court agreed that the emails from the defendants should  
22 be produced.

23 So the defendants in this case had every  
24 opportunity to go back before the state court and say let's  
25 litigate the issue of the arbitrability. They did not do

1 that.

2           The central issue before this Court has to do with  
3 the issue of -- of whether or not discovery should be stayed.  
4 And I --

5           THE COURT: Well, you know why I'm confused,  
6 because I'm not really sure what the issue is. Is the issue  
7 whether or not Mr. Zheng was cloaked with the authority to  
8 enter into a contract? Or is the issue that there were some  
9 secret meetings that -- that resulted in fraud in the  
10 inducement of the contract? I don't -- I'm a little  
11 confused.

12           And obviously, that has lot to do with not only  
13 today's proceeding but on a go-forward basis before Judge  
14 Hayden, all of those motions.

15           MR. MATTHEWS: We believe that -- we briefed this,  
16 Your Honor -- that it has to do with the secret meetings and  
17 the secret agreement before any of these contracts ever came  
18 in. And it's -- it's the plaintiff's position that this  
19 isn't about seven or eight contracts. This is about an  
20 entire course of fraud and breach of fiduciary duty.

21           THE COURT: So he didn't have the authority because  
22 he was acting fraudulently? Is that what your argument is?

23           MR. MATTHEWS: He did have -- no, Your Honor.

24           THE COURT: Okay.

25           MR. MATTHEWS: To be specific, the only arbitration



1 | agreements that existed with any of Minmetal's customers were  
2 | with these defendants.

3 |           THE COURT: Right.

4 |           MR. MATTHEWS: We've provided evidence,  
5 | essentially, an affidavit stating that he had no authority to  
6 | put in any of the agreements that he had with any customers,  
7 | a arbitration and a choice of law provision. Normally their  
8 | transactions take place by what are called purchase orders.  
9 | And the company used standard purchase orders. These are the  
10 | only defendants that had purchase orders and a -- I would  
11 | point out, secret contract. These contracts never came to  
12 | Minmetal's attention until this matter essentially became in  
13 | dispute.

14 |           THE COURT: So they're secret contracts because  
15 | Zheng was the only one in the company that knew about them?

16 |           MR. MATTHEWS: That is correct, Your Honor.

17 |           THE COURT: But isn't Zheng an executive?

18 |           MR. MATTHEWS: He is, Your Honor. He was the -- at  
19 | that time head of what was called the rare earth division.

20 |           And I should point out to the company -- point out  
21 | to the Court that Minmetals U.S.A. is what we're talking  
22 | about. They've pointed out that it's a subsidiary, but this  
23 | company is a New Jersey company. The department that he in  
24 | was not a huge department. He was in charge of that  
25 | department.

1           The evidence shows that he entered into this secret  
2 agreement. They'd exchanged emails. Our petition is he did  
3 not have the authority to -- to put in any agreements a --

4           THE COURT: Arbitration?

5           MR. MATTHEWS: -- arbitration agreement with  
6 respect to SETAC or with respect to the choice of law.

7           And all the other agreements that were used by the  
8 company were purchase orders which did not contain this  
9 arbitration or choice of law provision that everything would  
10 be held or litigated in China. For example, B & H, one of  
11 the defendants at the core of this case, is a New Jersey  
12 corporation delivered within the state of New Jersey to  
13 Minmetals, a New Jersey company, an order. Our proof shows  
14 that that product actually came from the scheme and actually  
15 belonged to Minmetals. That's a larger part of this case.

16           It's a little bit confusing, Your Honor, but this  
17 case has been going on for two years, so we're conversant  
18 with the facts.

19           But to bring the Court up to date, the defendants  
20 were engaged in a transaction, doing investment, then used  
21 the funds and money to do another investment and another  
22 investment. So we've been able to trace that that  
23 transaction with B & H, which eventually led to this lawsuit,  
24 was actually with product that was stolen from Minmetals in  
25 a -- based of a corporate opportunity.

1 THE COURT: How do -- how do you know it was  
2 stolen?

3 MR. MATTHEWS: We have the documents which prove  
4 exactly how it was acquired. We have the evidence that shows  
5 the transaction that resulted in that particular transaction.

6 And I would point out to the Court, as counsel has  
7 stated, there's a litigation in Hong Kong --

8 THE COURT: Right.

9 MR. MATTHEWS: -- where we put in in evidence  
10 before a Hong Kong court, essentially proving that the money  
11 that B & H received was actually from scheme and had been  
12 stolen from Minmetals, and the court there put in place a  
13 freeze order. So that money now is being frozen, being held  
14 in accordance with our injunction proceedings.

15 But the core issue before this Court under  
16 Rule 26(c) is really the standard by which this Court should  
17 view what has been taking place there. First of all, the  
18 entire purpose of their claim to arbitration is that we have  
19 to save costs, we have to make it convenient, and we cannot  
20 prejudice the defendant if there's an arbitration clause.

21 This case, Your Honor, has been going on now for  
22 over two years. Most of that time, the defendants have  
23 actively participated in discovery, selectively. We dispute  
24 that there were thousands of documents. In fact, there were  
25 only a few hundred exchanged from the defendant. And as is

1 pointed out on Exhibit 18 in the affidavit that is filed by  
2 counsel --

3 THE COURT: I'm listening, I'm just trying to get  
4 on.

5 MR. MATTHEWS: -- the judge entered -- Judge  
6 Velazquez entered a very specific order after much of going  
7 back and forth to the purpose of the emails. We demonstrated  
8 that those emails were integral to our position proving that  
9 Li Zheng entered into a secret agreement with Min Dang and  
10 the emails would demonstrate that. They never produced them.  
11 They never complied with that. We were filing a motion to  
12 compel when this case was moved.

13 So I would point out, Your Honor, that there's been  
14 considerable litigation back and forth. And the issue at  
15 this point is whether or not there's going to be any undue  
16 harm to the defendants.

17 The only thing that they are not producing have  
18 been things that a state court judge has ordered them to  
19 produce, after having heard all the arguments from both  
20 sides.

21 On the other hand, the plaintiff is going to be  
22 significantly damaged, because the issue that we believe  
23 these emails in particular will demonstrate is that there was  
24 this prior agreement and that Li Zheng was acting without  
25 authority and that these arbitration clauses were put in as a

1 part of their scheme to take it away from the United States  
2 and have those issues decided in a different forum.

3 I would point out, Your Honor, that counsel has --  
4 they've argued that the FAA have their standards, and that's  
5 a substantive issue for the district court to decide on the  
6 issue of looking at whether or not there's arbitrability.  
7 The issue was decided over a year ago. On January 3rd, Judge  
8 Velazquez entered his decision. We did not have this motion  
9 to stay until February of 2014. That's an entire year.

10 THE COURT: What about the Guidotti case, though?

11 MR. MATTHEWS: I'm sorry, Your Honor?

12 THE COURT: What about the Guidotti case which was  
13 decided after?

14 MR. MATTHEWS: The Guidotti case was decided in  
15 March of 2013, Your Honor.

16 THE COURT: Right.

17 MR. MATTHEWS: So from the time of March of 2013  
18 until almost a year later --

19 THE COURT: Oh, I see what you're saying.

20 MR. MATTHEWS: -- the defendants took no action,  
21 certainly --

22 THE COURT: Okay.

23 MR. MATTHEWS: -- on discovery issues under  
24 Rule 72(a), if there's going to be an appeal or challenge to  
25 a discovery, it has to be timely. In this case, they've

1 waited over a year before filing this. I would submit,  
2 Your Honor, that it's untimely. The -- they have made no  
3 attempt at all to argue prejudice or harm to them from  
4 complying with discovery. On the other hand, Your Honor, the  
5 plaintiffs would be significantly damaged from being able to  
6 move forward. As counsel has pointed out, there's been  
7 significant litigation. There are motions pending which go  
8 to the merits of this case.

9 We're in the process and very close to being able  
10 to file a summary judgment. They've known that for over a  
11 year, since the judge ordered --

12 THE COURT: You're not very close to filing a  
13 summary judgment.

14 MR. MATTHEWS: Well, I would agree, Your Honor, but  
15 only --

16 THE COURT: Judge Hayden would agreed, because she  
17 requires that final pretrial order be signed off by me prior  
18 to the filing of any disposition -- any dispositive motions.  
19 Just for your information.

20 MR. MATTHEWS: Thank Your Honor, I appreciate the  
21 procedural issue there. But our position is that the  
22 discovery that we're seeking is tailored. It goes to the  
23 very same issue that is in dispute here. And quite frankly,  
24 if we were going before the District Court on the issue of  
25 whether or not there's going to be discovery, we would be

1 asking for exactly the same discovery. The depositions of --  
2 very limited depositions with respect to Li Zheng's authority  
3 to enter into this, and the conspiracy that they entered  
4 into -- to show that there was no apparent authority.

5 THE COURT: Let me -- let me ask you, when you say  
6 depositions about Zheng's authority, would they be 30(b)(6)  
7 witnesses? I mean what kind of witnesses would you depose  
8 about his authority?

9 MR. MATTHEWS: Certainly Min Dang with respect to  
10 their -- their agreement --

11 THE COURT: Okay.

12 MR. MATTHEWS: -- and the exchange between them.  
13 30(b)(6) is a very interesting issue, because, Your Honor, at  
14 this point, the other defendant entities all had alleged --  
15 for example, Dragon Boom had alleged that -- Min Dang had  
16 alleged that he had nothing to do with Dragon Boom.

17 THE COURT: Okay.

18 MR. MATTHEWS: And he wasn't involved with them.  
19 And the discovery that we've obtained is one hundred percent  
20 opposite that, that he -- he was the only personal making  
21 financial decisions and writing checks for -- and making  
22 decisions about contracts.

23 And we have evidence that there's emails exchanged  
24 between he and Li Zheng with respect to contracts concerning  
25 Dragon Boom.

1           So the discovery that should go forward,  
2 Your Honor. Both parties agree that it goes to the issue of  
3 Li Zheng's authority. It's both written discovery or at this  
4 point significant deposition discovery, 30(b)(6) as well as  
5 of course Min Dang.

6           THE COURT: I'm having computer problems.

7           (Pause in proceedings)

8           THE COURT: They're fixing my computers in my  
9 chambers, and we've determined that might be upsetting the  
10 computers on the bench. So I can't have access to the entire  
11 docket. But that's okay.

12          MR. MATTHEWS: But I do want to point out  
13 Exhibit 14 that's attached to their --

14          THE COURT: I can't get -- yeah.

15          MR. MATTHEWS: -- moving papers, it's Judge  
16 Velazquez's orders.

17          THE COURT: Right.

18          MR. MATTHEWS: Exhibit 18 --

19          THE COURT: We saw the opinion and the orders.

20          MR. MATTHEWS: Exactly. Exhibit 18, Your Honor, is  
21 the order that he entered compelling them to produce the  
22 emails in a form that was accessible to us. And that has  
23 been outstanding now for over a year.

24          THE COURT: Okay.

25          MR. MATTHEWS: So these issues go directly to that.



1 The plaintiff would be significantly damaged at this point  
2 from now just a blanket wholesale stay of discovery.

3 THE COURT: Okay. Thank you.

4 MR. MATTHEWS: Thank you.

5 THE COURT: Does Dragon Boom want to argue? I  
6 didn't forget you.

7 MR. JANIEC: Thank you, Judge. No, Judge, I'll  
8 rely on the argument by cocounsel.

9 THE COURT: Okay. You want to respond?

10 MR. DEVANEY: Thanks, Your Honor, I do, just very  
11 briefly.

12 Plaintiffs had said that they've only propounded  
13 narrowly tailored discovery going to the issue of Li Zheng's  
14 authority, but what started our very first letter to this  
15 Court and began the motion to stay the discovery was a  
16 subpoena for the bank records of a non-party.

17 I don't think it helps the Court to engage in a  
18 "did not/did too," although I take serious issue with much of  
19 what was said. There are many other contracts with  
20 arbitration clauses. These contracts were well known in  
21 China, based upon our investigation.

22 But you hit the nail on the head, Your Honor. The  
23 issue is whether Li Zheng is cloaked in the authority to  
24 enter into the contracts. If he is, all of the merits that  
25 they're talking about can be arguing before the SETAC panel

1 in China. If the District Court at the end of all of this  
2 determines he's not, then we will be fighting about the same  
3 things in front of Judge Hayden.

4 But the issue right now is a stay of discovery  
5 until the motion to compel is decided, and that issue is, as  
6 you pointed out, was Li Zheng cloaked in the authority to  
7 enter into the contracts. We believe he was.

8 If Your Honor doesn't have any other questions, I  
9 don't have anything further.

10 THE COURT: No. I don't have questions. I'm still  
11 trying to understand. The issues seem so divergent. I  
12 thought that it was very clear that the initial issue was  
13 Zheng's authority or not.

14 MR. DEVANEY: Correct.

15 THE COURT: And was some discovery obtained with  
16 respect to his authority or exchanged? Was there some  
17 discovery on that particular issue that's been exchanged? Or  
18 no?

19 MR. DEVANEY: The Superior Court ordered discovery.

20 THE COURT: Yeah, I see that.

21 MR. DEVANEY: And it's been --

22 THE COURT: -- wholehearted --

23 MR. DEVANEY: -- you know, quite frankly --

24 THE COURT: -- trial discovery. I see that.

25 MR. DEVANEY: Exactly. And, you know, we have

1 | issues with the amount of discovery they've produced just as  
2 | they have issues with the amount of discovery we've produced.

3 |           THE COURT:   Okay.

4 |           MR. DEVANEY:   And if we get to discovery, I think  
5 | we're going to need some adult supervision to sort that all  
6 | out.

7 |           THE COURT:   Well, I agree with that.   I agree that  
8 | there needs to be a scheduling order and that issuing  
9 | non-party or third-party subpoenas prior to a scheduling  
10 | order was a little surprising to me, actually.

11 |           But what I'm getting from Minmetals is that the  
12 | issue is not necessarily authority.   And that's what's -- I  
13 | don't think that -- that that matters in terms of the motions  
14 | before Judge Hayden, but it mattered to us in trying to  
15 | prepare for today, because we couldn't quite clarify if  
16 | plaintiff is saying that Zheng may be an executive and he may  
17 | have entered into contracts, as stated in the complaint, but  
18 | this time, because he was acting in bad faith, he didn't have  
19 | the authority.   Is that -- or am I making your issues?

20 |           Is that -- and that's really confusing to me.   I  
21 | understand the -- from the defendants' standpoint what you  
22 | believe the issues to be, and that's what I initially  
23 | thought.   But --

24 |           MR. MATTHEWS:   Your Honor --

25 |           THE COURT:   They're sort of conflated, if you will.

1 I don't --

2 MR. MATTHEWS: They're certainly intertwined. And  
3 the state court judge in looking at this -- and I'll just  
4 read a quick sentence --

5 THE COURT: Uh-huh.

6 MR. MATTHEWS: -- where he -- it turned out review  
7 of the Minmetal complaint demonstrate that the gist of  
8 plaintiff's claim is that its employee conspired with  
9 defendants to defraud Minmetals and to deprive it of its  
10 product and profits.

11 THE COURT: But what --

12 MR. MATTHEWS: So this was --

13 THE COURT: -- okay, so that -- I understand that  
14 you're claiming that there was this conspiracy and this  
15 fraud.

16 But tie in what your opinion of Zheng's authority  
17 is. Because you do say in paragraph 21 of the complaint, Li  
18 Zheng, a trusted executive employee of Minmetals, who as an  
19 authorized signatory for contracts on behalf of Minmetals,  
20 undertook to systemically exploit an actual and/or potential  
21 shortage in the availability of rare earth.

22 So your -- you have two different theories. That  
23 paragraph says he had the authority. But it also says he  
24 sought to exploit that authority.

25 And this really matters to Judge Hayden because her

1 level of authority in making her determinations on the motion  
2 to compel hinge on what the issue is.

3 MR. MATTHEWS: The -- there's never -- and I -- I  
4 understand counsel now is alleging that somehow this  
5 arbitration clause in and of itself, but our position is that  
6 the arbitration -- he had no authority to use the arbitration  
7 clause.

8 THE COURT: Okay.

9 MR. MATTHEWS: Or the choice of law --

10 THE COURT: Okay.

11 MR. MATTHEWS: -- clauses.

12 And the issue of his authority, Your Honor, has to  
13 be considered not in a narrow context of just looking to see  
14 if he had authority or not, because we provided declarations  
15 with respect to that. Or didn't. And the extent of his  
16 authority.

17 The issue is, What was he doing in terms of his  
18 relationship with the defendants? Did they have reason to  
19 believe, because of the prior discussion and secret agreement  
20 with him --

21 THE COURT: Right.

22 MR. MATTHEWS: -- they knew that there was no issue  
23 of apparent authority. They did not rely upon whether he had  
24 apparent authority or not.

25 THE COURT: How do they know that?

1           MR. MATTHEWS: Well, first, Your Honor, Min Dang is  
2 a former -- was a former employee of China Minmetals. And  
3 they've known each other for -- of many years. So he knew  
4 exactly the extent of his authority.

5           But our evidence demonstrate that after he left,  
6 they entered and actually met -- into a secret agreement in  
7 which they determined that they were going to undertake at  
8 this point a scheme to exploit Minmetals and at that time  
9 what was the rising cost of rare earth.

10           And just quickly, Your Honor, the Court may very  
11 well recall in 2009, mid-2010, there was an issue with  
12 respect to China determining that they were going to reduce  
13 the amount rare earth for environmental reasons, and as a  
14 result from one month to the next, the next 6 months, the  
15 rare earth was reduced by 72 percent.

16           And naturally, of course, that was known by Li  
17 Zheng. And even before that took place, our evidence is that  
18 they had the discussion and made the plan.

19           THE COURT: Okay.

20           MR. MATTHEWS: So we're talking about a scheme.

21           And part of that plan, of course, is that it's been  
22 our position that his intrusion into the contracts of the  
23 choice of law in China, particularly for two U.S. companies  
24 who are doing business only in the U.S. and only with  
25 themselves, highly unusual.

1           And no other customers, and I will -- that's an  
2           evidentiary point. But we -- we obviously know who were in a  
3           similar situation buying from them, had these particular  
4           clauses, except for those other companies that they recruited  
5           into their scheme.

6           THE COURT: Okay.

7           MR. MATTHEWS: So the issue on discovery,  
8           Your Honor, of course, has to -- we must be able to  
9           demonstrate the extent to which he exceeded or performed acts  
10          that were outside of his duties and obligations. That is why  
11          the discovery must be a little broader, and that's why the  
12          state court judge in his decision to allow pretty much  
13          unlimited discovery, determined that given the case, for him  
14          to have a hearing on Li Zheng -- Li Zheng's authority, would  
15          essentially require a hearing on determining whether or not  
16          there was evidence to prove the conspiracy, as well as their  
17          relationship together.

18          THE COURT: Okay.

19          MR. DEVANEY: I don't -- Your Honor, unless you  
20          have any other questions, I don't have anything further.

21          THE COURT: No. I don't. Thank you.

22          MR. DEVANEY: Got -- there, excuse me.

23          THE COURT: I have before me a motion to stay  
24          discovery by the defendants in this case. And I take note  
25          that the motion to compel arbitration should be decided

1 fairly quickly. It was filed a long time ago, I think, was  
2 it July or?

3 MR. DEVANEY: It was filed in July, fully briefed  
4 in early September.

5 THE COURT: Right. So Judge Hayden will  
6 necessarily determine at that point arbitrability. And under  
7 Guidotti, I think right now it would be futile to permit  
8 discovery to continue. I'm going to temporarily stay  
9 discovery until Judge Hayden makes her decisions in that  
10 motion, and that will then dictate what type of discovery  
11 should be taken. I don't think any party's going to be  
12 injured by a short temporary stay of discovery.

13 I thank you all.

14 MR. DEVANEY: Very good, thank you very much,  
15 Your Honor.

16 (Conclusion of proceedings at 12:04 P.M.)

17

18

19

20

21

22

23

24

25



## Certification

1  
2 I, SARA L. KERN, Transcriptionist, do hereby certify  
3 that the 33 pages contained herein constitute a full, true,  
4 and accurate transcript from the official electronic  
5 recording of the proceedings had in the above-entitled  
6 matter; that research was performed on the spelling of proper  
7 names and utilizing the information provided, but that in  
8 many cases the spellings were educated guesses; that the  
9 transcript was prepared by me or under my direction and was  
10 done to the best of my skill and ability.

11 I further certify that I am in no way related to any of  
12 the parties hereto nor am I in any way interested in the  
13 outcome hereof.

14

15

16

17

18 s/ *Sara L. Kern*

February 17, 2014

19 \_\_\_\_\_  
Signature of Approved Transcriber\_\_\_\_\_  
Date

20

21

22 Sara L. Kern, CET\*\*D-338  
23 King Transcription Services  
24 901 Route 23 South, Center Suite 3  
25 Pompton Plains, NJ 07444  
(973) 237-6080